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No. 99-628

IN THE
Supreme Court of the United States

CYNTHIA ANDREWS *et vir, et al.*,
Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Vermont Supreme Court

BRIEF IN OPPOSITION OF RESPONDENTS ELIZABETH SOJOURNER, *ET AL.*

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269

QUESTION PRESENTED

Where a State pays tuition to private schools for instructing students in secular subjects, but refuses to pay tuition for students to attend pervasively sectarian schools because the public funds would be used to finance religious instruction and other religious activities, does that refusal violate the Free Exercise rights of parents who choose to have their children attend a pervasively sectarian school but whose religion does not require such attendance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Factual Background	1
B. Proceedings Below	4
REASONS FOR DENYING THE WRIT	9
I. RESOLUTION OF THE IDIOSYNCRATIC QUESTION PRESENTED BY THIS CASE WOULD PROVIDE NO GUIDANCE ON THE FUNDAMENTAL QUESTIONS RAISED BY PROGRAMS THAT PROVIDE PUBLIC ASSISTANCE TO SECTARIAN PRIVATE SCHOOLS	9
II. THERE IS NO CONFLICT AMONG THE LOWER COURTS WITH RESPECT TO THE QUESTION PRESENTED	12
III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT	17
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.), *cert. denied*, 68 U.S.L.W. 3247 (U.S. Oct. 12, 1999) 14
Board of Educ. of Kiryas Joel Village Sch. v. Grumet, 512 U.S. 687 (1994) 8
Brusca v. Missouri, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) 12, 14, 15
Buckley v. Valeo, 424 U.S. 1 (1976) 14
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 17, 18
Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357 (1999) 13, 15, 16
Employment Div. v. Smith, 494 U.S. 872 (1990) 17
Goodall v. Stafford County Day Sch. Bd., 60 F.3d 168 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996) 12, 15
Harris v. McRae, 448 U.S. 297 (1980) 14
Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) 13, 15, 16
Hernandez v. Commissioner, 490 U.S. 680 (1989) 11
Jackson v. California, 460 F.2d 282 (9th Cir. 1972) 15
Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) 15
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) 14
Maher v. Roe, 432 U.S. 464 (1977) 14
McCarthy v. Hornbeck, 590 F. Supp. 936 (D. Md. 1984) 15
McDaniel v. Paty, 435 U.S. 618 (1978) 17, 18
Miller v. Benson, 878 F. Supp. 1209 (E.D. Wis.), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995) 15
National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998) 14, 18
Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ., 996 F. Supp. 855 (E.D. Wis. 1998) 15
Norwood v. Harrison, 413 U.S. 455 (1973) 14
Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 12, 15, 16, 17

TABLE OF AUTHORITIES—Continued

Page

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 14
Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976) 15, 16
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 17, 18
Rust v. Sullivan, 500 U.S. 173 (1991) 14
Sherbert v. Verner, 374 U.S. 398 (1963) 8, 14
Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 68 U.S.L.W. 3129 (U.S. Oct. 12, 1999) 14
Thomas v. Review Board, 450 U.S. 707 (1981) 11
Witters v. Washington Comm'n for the Blind, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989) 15

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Amend. I

Establishment Clause 6, 9, 10, 11, 12
Free Exercise Clause ..... *passim*
Free Speech Clause 6, 10, 11, 12

Amend. XIV, Equal Protection Clause 6, 10, 11, 12

Vermont Constitution, Chapter I, Art. 3 ..... 6, 7
16 V.S.A. § 166(b) 2
16 V.S.A. § 822 1
16 V.S.A. § 824 1
16 V.S.A. § 906 2

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BRIEF IN OPPOSITION OF RESPONDENTS ELIZABETH SOJOURNER, *ET AL.*

Respondents Elizabeth Sojourner, Frances Love, Harriet Thorne, Rev. Ronald Benedict, Richard Clark, Hugh Short, and John Vita ("respondents"), citizens and taxpayers of the town of Chittenden, Vermont, who intervened as defendants in this lawsuit, respectfully ask this Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Factual Background

Vermont requires school districts to provide their students with a high school education, but allows a district to do so either by maintaining its own high schools or by paying tuition to other approved public or independent (*i.e.*, private) high schools selected by the students' parents. *See* 16 V.S.A. §§ 822, 824. A private school can

be approved for this purpose if, *inter alia,* the Vermont Board of Education determines that the school's educational program includes a satisfactory minimum course of study and the school has sufficient resources and a qualified faculty. *See* 16 V.S.A. §§ 166(b), 906.

The Chittenden Town School District ("District"), located in Rutland County, Vermont, does not operate a high school, but instead pays tuition for its students to attend other public or independent high schools. There are six public high schools within Rutland County that are available to students from Chittenden, and those students also can choose to attend approved public or independent high schools within or outside the State of Vermont. Stipulation Regarding Facts of the Case ("Stip.") ¶¶ 11-15.

This case arose when, in May 1996, the District's School Board voted to pay tuition to Mount Saint Joseph Academy ("MSJ"), a Catholic high school in Rutland County that is attended by a number of students from Chittenden.

MSJ is a pervasively sectarian private school, "in which the secular and sectarian aspects of [the] educational program are intertwined." App. 4. The school is owned and operated by the Sisters of Saint Joseph, under the authority of the Roman Catholic Diocese of Burlington. App. 3. All students at MSJ are required to complete courses in theology, entitled Salvation History, Sacraments, Ethics and Commitment. App. 4.[1] The school day begins with

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[1] MSJ describes its theology curriculum as follows:

> During a four year period, the development of spirituality is found through liturgy, prayer, retreat and experiential learning activities. . . . Through the historical and biblical study of our faith roots, presentations, and discussions on the Gospels and lives of Christian leaders, students build a foundation for the development of their individual spiritual lives. [*Id.*]

a prayer, to which all students are required to give attention. *Id.* Teachers also are encouraged to begin each class during the day with a prayer. Stip. ¶ 78. All students, including non-Catholics, are required to attend a monthly celebration of the Roman Catholic mass led by a priest, as well as an annual spiritual retreat, which includes prayers and a mass, and a twice-yearly celebration of the Sacrament of Reconciliation. App. 4-5. All faculty are required to adhere to Catholic doctrine in their teachings. App. 5. A central objective of MSJ's educational program is to have students "witness a sense of Catholic identity—one that is rooted in an understanding of the Gospel of Jesus as proclaimed within our Catholic tradition." Stip., Exh. P, p. 1; *see* App. 4.[2]

The tuition payments authorized by the Chittenden Board were to take the form of a check drawn on the Town's public funds and sent directly to MSJ. Stip. ¶ 46. The payment would be made with "no restrictions on the type of activities or programs for which [the] funds may be used," *id.*, and "[t]he Chittenden School District has never requested or received, and does not intend to request or receive, any representations from MSJ that public moneys will not be spent on religious observance, inculcation of religious values, or on religious education," *id.* ¶ 49. The money would be placed in MSJ's general operating account, and MSJ does not separately account for sectarian and secular expenditures. *Id.* ¶ 83.

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[2] One of MSJ's two classroom buildings contains a large chapel and is crowned by a large cross. Stip. ¶ 70. That building also contains the congregational administrative offices of the Sisters of Saint Joseph, the living quarters of the President of the order, and a gift shop that sells religious objects. *Id.* The building is connected to the former convent house of the Sisters of Saint Joseph (now an assisted care living facility operated by the Sisters and used principally by them) by a structure that contains the living quarters of six of the Sisters. *Id.* ¶ 69. Crucifixes or crosses hang on the walls of most MSJ classrooms. *Id.* ¶ 70.

By making unrestricted tuition payments to MSJ, the District would "expend public money on religious education." App. 12.[3] Indeed, because the money could be used to finance MSJ's required religious services and the upkeep of its chapel, public funds would be expended not only on religious education, but on religious *worship* as well.

There is no evidence that any student attends MSJ because his or her religious beliefs require such attendance. Of the seven families whose reasons for choosing MSJ are a matter of record, five had no religious motivation at all, but focused on such considerations as the school's "discipline," "structured environment," "value-based education," "small classes" and "good educational reputation." Stip. ¶¶ 22-24, 26, 28. One parent stipulated that she chose MSJ for her daughter "because of her religious beliefs," without further elaboration, *id.* ¶ 21, while for one other parent, in addition to a variety of non-religious reasons for selecting MSJ, "MSJ's Catholic basis was also very important," *id.* ¶ 25. In no instance does the stipulated record suggest that any parent's religion *required* that a child attend a Catholic school.

B. Proceedings Below

The Vermont Department of Education ("Department") responded to the District's action by terminating all general state aid to the District, on the ground that the District's decision to pay tuition to MSJ was unconstitutional. *See* Petition for a Writ of Certiorari ("Pet.") at 5.

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[3] These payments would produce a substantial financial benefit for MSJ. The school expects that its enrollment will increase if the courts sustain the District's decision to pay tuition to MSJ, Stip. ¶ 110, and the increased tuition MSJ thereby would receive would greatly exceed any increased costs associated with the additional students, *id.* ¶ 109.

The District brought suit against the Department in state court, seeking a declaration that its decision to pay tuition to MSJ was "in compliance with the Constitution of the State of Vermont and the United States Constitution." Order of the Superior Court dated October 17, 1996, ¶ 2.[4] The Department counterclaimed, seeking a declaration that the District's decision to make tuition payments to MSJ violated the Federal and State Constitutions, and requesting an injunction. App. 6.

Petitioners Cynthia and Douglas Andrews, *et al.*—parents who are sending children to MSJ and who seek payment of the MSJ tuition by the District—were allowed to intervene. However, their request to file a complaint in intervention was disallowed, and petitioners' "participation in th[e] action [was] limited to litigation of the claims and defenses of plaintiff Chittenden School District." Order of the Superior Court dated February 26, 1997. Respondents Elizabeth Sojourner, *et al.*—residents of the Town of Chittenden who oppose the use of their state and local tax payments to fund religious education and other religious activities—also were allowed to intervene. App. 6-7.

The superior court granted the Department's motion for summary judgment, concluding that "tuition payments from a school district to pervasively sectarian high schools . . . would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." App. 7.

The District appealed from the superior court's decision, advancing only two arguments: "that (1) tuition payment to sectarian schools does not violate either the United States Constitution or the Vermont Constitution as long

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[4] The District initially asserted other claims as well, but they were withdrawn. *Id. See also* App. 6 and n.1.

as it is based on a parent's free choice of educational provider, and (2) exclusion of sectarian schools from reimbursement violates the Free Exercise Clause of the First Amendment to the United States Constitution." App. 7-8. The District did not contend that such exclusion violates the Free Speech Clause or the Equal Protection Clause.[5] Nor did petitioners make such contentions; indeed, they could not have done so under the terms of their limited intervention.[6]

The Supreme Court of Vermont affirmed, holding that the payment by a public school district of tuition for religious instruction violates Chapter I, Art. 3 of the Vermont Constitution, which provides, *inter alia*, "that no person ought to, or of right can be compelled to . . . support any place of worship, or maintain any minister, contrary to the dictates of conscience." Thus the Court "decide[d] this case based solely on the Vermont Constitution and, since it is dispositive, [did not] need [to] consider whether the Establishment Clause of the First Amendment would also prohibit the tuition reimbursement policy at issue here." App. 15.

In deciding the state-law question presented to it, the Vermont Court emphasized that its holding was based on "the absence of adequate safeguards against the use of [public] funds for religious worship." App. 2. The Court explained:

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[5] *See* Appellants' Opening Brief [in the Vermont Supreme Court] at 1, 11, 25 (asserting that the exclusion of MSJ from the tuitioning program would violate the Free Exercise Clause, but making no assertion that the Free Speech Clause or the Equal Protection Clause would be violated); Appellant's Reply Brief at 10 (same). The District had not asserted Free Speech or Equal Protection claims in its complaint. *See supra* at 5.

[6] *See* Plaintiff-Intervenors-Appellants [sic] Appeal Brief; Reply Brief of Plaintiff-Intervenor/Appellants.

> We are not dealing here with the myriad ways that a public school district can subsidize education in a religious school by paying for expenses that occur whether or not the school was sectarian. . . . Nor is this a case where the amount of the subsidy is so small that it clearly covers only the cost of secular educational expenses. . . . Nor . . . is the issue that education occurs in a religious school, rather than the content of that education. In this case, the financing scheme can, and presumably will, directly pay for religious instruction.
>
> * * * *
>
> Thus, we conclude that the Chittenden School District tuition-payment system, with no restrictions on funding religious education, violates Chapter I, Article 3. In expressing this conclusion, we think it appropriate to state what we have not decided. The major deficiency in the tuition-payment system is that there are no restrictions that prevent the use of public money to fund religious education. . . . We express no opinion on how the State of Vermont can or should address this deficiency should it attempt to craft a complying tuition-payment scheme. We decide only that the current . . . system, with no restrictions on the purpose or use of the tuition funds, violates Article 3.

App. 50-52.

The Court then turned to the only other issue that had been presented to it: whether Vermont's refusal to fund religious education violates the Free Exercise Clause. The Court observed that the limited nature of its holding eliminated the predicate for the District's Free Exercise claim:

> The Free Exercise argument is premised on plaintiff's assumption that we would conclude that children who attend religious schools may not receive

> public educational funding, while children who attend public schools may. This is not our ruling. *We have determined only that public funds may not pay for religious worship within the meaning of Article 3, wherever it occurs.*

App. 53 (emphasis added).

Because the Court's holding was entirely consistent with the principle of "neutrality toward religion," App. 53 (quoting *Board of Educ. of Kiryas Joel Village Sch. v. Grumet*, 512 U.S. 687, 696 (1994)), and "today's ruling requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government," App. 54 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)), the Court concluded that no colorable Free Exercise claim was presented. *Id.*

The Andrews Intervenors have petitioned for certiorari. The Chittenden Town School District has not. Rather, in March 1999, the District revised its tuition policy "to prohibit the payment of tuition to sectarian schools," on the ground that "payment of tuition to religious schools supports sectarian causes and is thus, an improper use of public funds." [7]

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[7] Letter from Chittenden Superintendent of Schools William J. Mathis to Richard Komer and Jack Facey, dated March 16, 1999 (reprinted as an appendix to this brief). Accordingly, there no longer is any dispute between the original parties to this litigation —the District and the Department. However, the case technically is not moot, as petitioners could seek reimbursement of the tuition they paid MSJ during the period that the District had authorized the payment of the tuition out of public funds.

REASONS FOR DENYING THE WRIT

The Petition does not properly set forth the sole question that actually is presented by this case. Given the facts of the case and the limited issues raised and decided below, the only question presented for possible review is whether, where a state pays tuition to private schools for instructing students in secular subjects, but refuses to pay tuition for students to attend pervasively sectarian schools because the public funds would be used to finance religious instruction and other religious activities, the state's refusal to fund such activities violates the Free Exercise rights of parents who choose to have their children attend a pervasively sectarian school, but whose religion does not require such attendance.

That idiosyncratic question does not warrant review by this Court. The question is, at most, tangential to the constitutional controversy over public assistance to sectarian private schools, and its resolution would provide no guidance as to the more fundamental Establishment Clause questions involved in that controversy. Indeed, resolving the question presented here would not even determine the constitutionality of the funding program involved in this particular case. (Point I.) Furthermore, there is no conflict among the lower courts with respect to the question presented (Point II), nor does the decision below conflict with any decision of this Court. (Point III.) Accordingly, the petition for certiorari should be denied.

I. RESOLUTION OF THE IDIOSYNCRATIC QUESTION PRESENTED BY THIS CASE WOULD PROVIDE NO GUIDANCE ON THE FUNDAMENTAL QUESTIONS RAISED BY PROGRAMS THAT PROVIDE PUBLIC ASSISTANCE TO SECTARIAN PRIVATE SCHOOLS

Petitioners acknowledge—indeed, they are at pains to demonstrate—that cases involving public assistance to pri-

vate sectarian schools, including tuition voucher programs, tuition tax credit programs, and other "school choice" programs, generally present questions under four discrete provisions of the United States Constitution: the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause. *See* Pet. at 15-19. Although petitioners declare that "[t]his case sits at the crossroads of [the issues presented by] all of these [provisions]," *id.* at 19, the case actually sits on a small side road.

The threshold question that has generated the most litigation in this area is whether, and to what extent, the Establishment Clause allows the use of public funds to pay tuition for students to attend sectarian private schools. *See* cases cited in Pet. at 15-17 and nn. 11-12; *id.* at 28-29, n.16. In asserting that "the questions presented [in this case] are of national importance and affect education-reform efforts across the nation," *id.* at 28, petitioners confirm the primacy of the Establishment Clause issue. *See id.* (declaring that "educational reform . . . initiatives have often been hamstrung and delayed by . . . Establishment Clause challenges"); *id.* at 29 (declaring that "[t]he hope for these and other educational-reform efforts depends on a clear ruling from this Court that . . . such initiatives are consistent with the Establishment Clause's . . . mandate").

But, as petitioners acknowledge, *see* Pet. at 15 n.11, no Establishment Clause question is presented in this case, because the Vermont Court held that the tuitioning program at issue is prohibited by the *Vermont* Constitution. *See supra* at 6. As a result, this case does not afford this Court an opportunity to address the fundamental federal constitutional issue presented by "school choice" programs. Furthermore, even if the question petitioners

seek to raise—*viz.*, whether the United States Constitution *requires* that public funds be made available to sectarian private schools in cases of this nature—might otherwise be thought to merit review, in the typical "school choice" case that question is intertwined with the question of whether the Establishment Clause *prohibits* such funding, and the two questions bear directly on each other. *See* cases cited in Pet. at 15-16 and nn. 11-12. It would not be productive for the Court to review this atypical case, in which the question presented by petitioners is not accompanied by the fundamental and interrelated Establishment Clause question that must be considered in arriving at any definitive conclusion as to the constitutionality of the kind of government funding petitioners advocate.

Moreover, petitioners indicate that three distinct constitutional claims can be advanced in support of demands, such as they make here, for public funding of sectarian schools: under the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause. *See* Pet. at 8. But only one of those three claims—a Free Exercise claim—was advanced in this case. Petitioners do not attempt to invoke the Equal Protection Clause, *see* Pet. at i (Questions Presented); and, although they purport to present a question under the Free Speech Clause as well as under the Free Exercise Clause, *id.*, they are precluded from doing so, inasmuch as they did not advance the Free Speech claim below. *See supra* at 6.[8]

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[8] As petitioners appear to recognize, *see* Pet. at 16 n.12; *id.* at 18, in this context claims under the Free Exercise Clause are by no means equivalent to claims under the Free Speech and Equal Protection Clauses. The Free Exercise Clause is implicated only where "government has placed a substantial burden on the observation of a central religious belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), by impeding "conduct mandated by religious belief," *Thomas v. Review Board*, 450 U.S. 707, 717-18

In short, any definitive ruling as to the constitutionality of the funding program at issue in this case—and any meaningful consideration of the constitutional status of "school choice" programs generally—would have to address questions arising not only under the Free Exercise Clause, but also under the Free Speech, Equal Protection and Establishment Clauses. This case presents none of those crucial questions. As a result, review of the ruling of the court below would be a purely academic exercise, and resolution of the idiosyncratic Free Exercise question presented here would not even resolve the constitutional status of the program involved in this case, much less that of other "school choice" programs.

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS WITH RESPECT TO THE QUESTION PRESENTED

Petitioners assert that the decision of the Vermont Supreme Court with respect to the Free Exercise issue conflicts with the decisions in *Peter v. Wedl*, 155 F.3d

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(1981). Because petitioners do not allege that their religion requires that children attend a pervasively sectarian school, *see supra* at 4, they cannot satisfy that threshold element of a Free Exercise Claim. *See Brusca v. Missouri*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (state's refusal to fund sectarian education does not violate parents' rights under the Free Exercise Clause where, *inter alia*, "[p]laintiffs make no contention that attendance at public schools is contrary to the basic precepts or tenets of their religion"), *aff'd*, 405 U.S. 1050 (1972); *Goodall v. Stafford County Day Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995) (where state refuses to pay for cued speech transliterator at a sectarian school, but would pay at a nonsectarian school, there is no Free Exercise claim because, *inter alia*, parents of the affected student "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"), *cert. denied*, 516 U.S. 1046 (1996). It therefore is apparent that the Free Exercise claim petitioners have advanced stands on a very different footing from the Free Speech and Equal Protection claims that could have been but were not asserted.

992 (8th Cir. 1998); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); and *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357 (1999). *See* Pet. at 9-14, 18. There is no such conflict.

The conflict petitioners attempt to generate is based on their characterization of this as "a case about discrimination [against religion]." Pet. at 9. But it is nothing of the kind. Vermont has adopted a simple and evenhanded policy: it offers a free secular education to all students, whether they choose to attend sectarian or nonsectarian schools, but refuses to pay for religious instruction and other religious activity, "wherever [they] occur." App. 53.[9] Consistent with that policy, the State will not pay petitioners' tuition because the school they have chosen (but which their religion does not *require* them to attend, *see supra* at 4) does not separate secular instruction from religious instruction—or indeed, from religious worship—and therefore cannot comply with the limitation "that public moneys . . . not be spent on religious observance, inculcation of religious values, or on religious education." *See supra* at 3.[10]

In adopting this policy, Vermont has done nothing to "prohibit the free exercise" of religion. There is a funda-

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[9] Nor, we hasten to add, does Vermont pay for students to be instructed *against* religion: public schools are constitutionally prohibited from proselytizing against religion, and there is no claim that the private schools that receive tuition from the State have been engaged in such activity.

[10] It is for this reason, and not because of any preference of one religion over another, *see* Pet. at 26-27, that the Vermont Constitution does not permit the payment of tuition to schools in which secular instruction is not separate from religious instruction, while leaving open the possibility of providing funds for secular instruction in sectarian schools that do make such a separation. *See supra* at 7-8.

mental distinction between *prohibiting free exercise*, on the one hand, and *declining to subsidize religious activity*, on the other. The Free Exercise Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). "The fact that government cannot exact from [a citizen] a surrender of one iota of [his] religious scruples does not, of course, mean that [he] can demand of government a sum of money, the better to exercise them." *Brusca v. Missouri*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)), *aff'd*, 405 U.S. 1050 (1972). There consequently is no "right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise." *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).[11]

There is no conflict among the lower courts as to how this settled principle applies in the context of a Free Exercise challenge to the exclusion of private sectarian schools from programs that provide assistance to other schools. The courts uniformly have rejected such challenges. Petitioners cite three of those decisions. *See* Pet. at 18 (citing *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me.), *cert. denied*, 68 U.S.L.W. 3247 (U.S. Oct. 12, 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.),

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[11] This Court has made a similar point in a series of cases holding that the government's refusal to subsidize speech or other protected activities cannot be viewed as an infringement of constitutional rights. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998); *id.* at 2183-84 (Scalia, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 193, 201 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46, 549 (1983); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980); *Maher v. Roe*, 432 U.S. 464, 475 (1977); *Buckley v. Valeo*, 424 U.S. 1, 98 (1976).

cert. denied, 68 U.S.L.W. 3129 (U.S. Oct. 12, 1999); *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989)). There are at least seven others, including two decisions that were summarily affirmed by this Court. *See Brusca, supra; Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974); *Goodall v. Stafford County Day Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Jackson v. California*, 460 F.2d 282 (9th Cir. 1972); *Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ.*, 996 F. Supp. 855, 863 (E.D. Wis. 1998); *Miller v. Benson*, 878 F. Supp. 1209 (E.D. Wis.), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995); *McCarthy v. Hornbeck*, 590 F. Supp. 936, 946 (D. Md. 1984).

Petitioners are mistaken in asserting that the decisions of the Eighth Circuit in *Peter*, the Sixth Circuit in *Hartmann*, and the Fourth Circuit in *Columbia Union College* are to the contrary. None of those cases holds that the Free Exercise Clause requires the government to provide funds to be used for religious activities.

Petitioners' reliance on *Columbia Union College* is particularly quixotic. That decision holds—as this Court previously had held with respect to the same statutory program in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976)—that it is proper (indeed, necessary) that Maryland's program of grants to public colleges requires prospective recipients to "demonstrate that no . . . funds will be used for 'sectarian purposes' including 'religious instruction, religious worship, or other activities of a religious nature.'" 159 F.3d at 154 (quoting the statute). The Fourth Circuit further held, as this Court had held in *Roemer*, that grants *must be denied* "to institutions that are so 'pervasively sectarian' that secular

activities cannot be separated from sectarian ones." *Id.* at 155 (quoting *Roemer*, 426 U.S. at 755). *See id.* at 159 (observing that nothing in later decisions "eviscerates *Roemer's* holding regarding direct money grants"). The Fourth Circuit merely held that further proceedings were necessary in order to determine whether Columbia Union College was in fact a pervasively sectarian school. *Id.* at 164-69. Here, in contrast, it is undisputed that MSJ is such a school. *See supra* at 2-3.[12]

Nor does *Hartmann* support petitioners' position. The Sixth Circuit emphasized in that case that the program from which the plaintiffs had been excluded—which designated the entities authorized to provide care to children of on-duty military personnel—was one that did *not* provide government funding or benefits to the care providers. Finding that "the relationship between the Army and the Provider . . . is solely one of regulator and regulatee," 68 F.3d at 980, the court stated that "a more serious and pressing concern" would arise if the program did "not just regulate, [but] also provide[d] benefits to participants," *id.* at 982.

In *Peter*, the Eighth Circuit, relying on cases that it described as having upheld the use of government funds for "*secular* teaching services at . . . private religious school[s]," 155 F.3d at 955 (emphasis added),[13] ruled that it would not be permissible for the state to deny a disabled child the necessary services of a paraprofessional who would assist [him] with his disabilities, translate [ ]

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12 The District conceded that point below. *See* Appellant's Opening Brief at 21 n.32 ("As a pervasively sectarian institution, MSJ is by definition incapable of segregating secular and religious aspects of its program.").

13 *See also id.* at 996-97 (funds for teaching of "nonreligious subjects").

his finger spelling, and adapt [ ] classroom tasks for [him]," *id.* at 994, merely because the child was attending a sectarian school. It is clear from the Eighth Circuit's analysis that the court saw *Peter* as a case in which a student had been denied government funds for services that could fairly be characterized as *secular*. This is not such a case.

Thus, the holding of the Vermont Supreme Court is consistent with an unbroken line of authority, and does not warrant review.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioners contend that the Vermont Court's decision conflicts with "the bedrock principle of this Court's First Amendment jurisprudence that the government 'may not . . . impose special disabilities on the basis of religious views or religious status.'" Pet. at 20 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). As we already have explained, that principle never has been understood to mandate government funding of religious practices, which is what petitioners are seeking. There is nothing to the contrary in the three cases upon which petitioners place principal reliance: *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *see* Pet. at 22-24; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *see* Pet. at 24-25; and *McDaniel v. Paty*, 435 U.S. 618 (1978), *see* Pet. at 25-26.

What was at issue in *Rosenberger* was the government's obligation of neutrality in affording access to a "public forum" created by the government "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. Where the government is not creating such a forum, but rather is deciding how to conduct its own

business, either as "speaker," *id.* at 833, as "transmitt[er] of a message it favors," *id.* at 834, or as "buyer" of services used to "promote a particular government program," *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2190-91 (1998) (Souter, J., dissenting), such "forum" principles are not implicated and the government has every right to "make content-based choices," *Rosenberger*, 515 U.S. at 833, including the right to "determine the content of the education it provides," *id.*

In addition to the fact that *Rosenberger* arose in the very different context of a request for access to a public forum, the case did not involve a demand for the use of general public funds, but rather for participation in the use of a special activities fund made up of payments from students. The Court specifically stated that its "decision . . . cannot be read as addressing an expenditure from a general tax fund," *id.* at 841, and Justice O'Connor emphasized that point in her concurrence, *id.* at 851-52.

Lukumi is, if anything, even less to the point here. That case involved no issue of government funding; it was one of the rare cases (*see* 508 U.S. at 523) in which a statute *outlawed* a particular religious practice.

Nor did *McDaniel* involve a refusal to fund religious activities. Rather, that case stands for the proposition that the state cannot deny an individual a *secular* right or benefit to which the individual otherwise would be entitled (in *McDaniel*, the right to run for public office) because the individual has engaged in a religious practice (in *McDaniel*, serving in the ministry). Here, in contrast, petitioners seek a benefit that is *not* secular: the tuition payment they demand would fund religious education and worship. *See supra* at 4, 7. That benefit is not provided, and need not be provided, by the State to anyone.

In sum, there is no decision of this Court that supports petitioners' contention that the government must provide funding for the religious instruction they wish to receive.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

RUTLAND NORTHEAST SUPERVISORY UNION
Brandon, Vermont 05733
FAX (802) 247-5540

March 16, 1999

Mr. Richard Komer
Institute for Justice
1717 Pennsylvania Ave., NW
Washington, DC 20006

Mr. Jack Facey
71 Allen Street
Rutland, VT

Gentlemen:

At its regularly scheduled board meeting of March 15, 1999, the Chittenden Town School District voted to warn [sic] a revision to their high school tuition policy to prohibit the payment of tuition to sectarian schools.

It is the view of the majority of the current board that payment of tuition to religious schools supports sectarian causes and is thus, an improper use of public funds.

The board has also directed me to notify you that any authority you or any of you have had previously to speak for, represent, or act on behalf of, the Chittenden School Board of Chittenden School District, is hereby terminated. In the event that any ministerial or substantive act remains to be done on behalf of the Board in connection with the pending appeal, no act should be taken without express prior consent of the board.

At the same time, the Chittenden board recognizes that there are contending views on the issues that are now

before the Vermont Supreme Court. The board is aware that all necessary documents have been filed and we are awaiting the decision of the court. By the above actions, the board does not wish to disturb the court's deliberations. We think it in the interests of all to have a clear and unambiguous decision from the supreme court regarding public payments to religious schools.

The board wishes to thank you for all your efforts.

Sincerely,

/s/ William J. Mathis
WILLIAM J. MATHIS, Ph.D.
Superintendent of Schools